No. 3292

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

AUGUST BLANC,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FRANK J. HENNESSY,
Attorney for Plaintiff in Error.

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AUGUST BLANC,

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Brief of Plaintiff in Error.

I.

STATEMENT OF THE CASE.

On the 5th day of September, 1918, the United States Attorney for the Northern District of California filed two Informations against August Blanc. The Information, numbered 7248, charged that the defendant did during the month of September, 1918, and particularly on or about the 4th day of September, 1918, in violation of Section 13 of the Act

of May 18, 1917, and the Act of October 6, 1917, and the Order of the Secretary of the Navy, issued on August 3, 1918, unlawfully and knowingly direct Louis Remegie to room 16 in a certain building located at No. 773 Broadway Street, San Francisco, for the purpose of lewdness, assignation and prostitution, and that said building was at all of the times mentioned in said information being used for the purpose of lewdness, assignation and prostitution, and was within ten miles of a place under Naval jurisdiction, to wit: Goat Island. The Information, numbered 7249, charged that the defendant did during the month of September, 1918, in violation of the same statutes mentioned in the preceding Information and the said Order of the Secretary of the Navy, willfully, unlawfully and knowingly keep a house of ill fame at No. 773 Broadway Street, San Francisco, known as the Globe Hotel, wherein prostitution was carried on, and that said hotel was within ten miles of Goat Island, a place under Naval Jurisdiction.

The defendant, upon his arraignment, entered a plea of "not guilty" to each Information. The two causes, having been consolidated, came on for trial on September 19, 1918, and the jury brought in a verdict of "Guilty" on each Information. Thereafter, on September 26, 1918, the defendant interposed a motion for a new trial, which was denied, and a Motion in Arrest of Judgment, which was also denied. Thereupon judgment was rendered, sentencing the defendant to imprisonment in the County Jail for a period of one year upon each charge; the

sentences, however, to run concurrently. A writ of error was thereafter sued out by the defendant to review the judgment and proceedings of the trial court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Court erred in denying the motion of defendant, made at the close of the Government's case, for a directed verdict of "not guilty" upon Information 7249 in that the evidence did not establish that defendant was at the times specified in the information, keeping a house of ill fame, wherein prostitution was carried on. The motion and ruling are contained at page 21 of the Transcript and are as follows:

Mr. COLSTON.—That is the Government's case, your Honor.

Mr. HENNESSY.—I would like to move for a directed verdict upon the count that charges the defendant with keeping a house of ill fame, upon the ground that a single act of prostitution would not constitute a house of ill fame.

The COURT.—That is quite true, but that is not this case. I am not passing on the weight of the evidence, but the jury, if they believe the evidence, might well find that it was a place where prostitution was habitually carried on. Motion denied.

Mr. HENNESSY.—Exception.

2. The Court erred in denying the motion of defendant, made at the close of the Government's case

for a directed verdict of "not guilty" upon Information No. 7248, in that the evidence did not show that the defendant had knowledge that Matilda Campbell was receiving men for the purpose of prostitution or that the hotel was a place maintained for the purpose of prostitution. The motion and ruling are contained at page 24 of the Transcript, and are as follows:

Mr. HENNESSY.—I would also move for an instructed verdict of "not guilty" upon the other count upon the ground that the evidence does not show that this man had knowledge that this woman was receiving men for the purpose of prostitution; secondly, it does not show that this house was a place maintained for the purpose of prostitution.

The COURT.—The same ruling.

Mr. HENNESSY.—Exception.

3. The Court erred in overruling the objection made by defendant to the witness for the Government, Louis Remegie: "Would you have arrested and appeared against this woman if you had sexual intercourse with her?" To which ruling the defendant duly excepted. (Trans. 36.)

4. The action of the trial court in denying the motion of defendant in arrest of judgment on the grounds that neither of the informations stated a public offense under the laws of the United States is assigned as error. (Trans. 49, 50.)

5. The action of the trial court in denying defendant's motion in arrest of judgment upon the ground that he had never been committed by any magistrate or indicted by a Grand Jury upon either

of the offenses charged in the Informations, is assigned as error. (Trans. 49, 50.)

ARGUMENT.

1. In order to sustain a conviction of the defendant under Information No. 7249, it was necessary to establish that the defendant during the month of September, 1918, willfully, unlawfully and knowingly kept a house of ill fame at No. 773 Broadway Street, San Francisco, wherein prostitution was carried on.

A single act of prostitution would not be sufficient to establish that a place was a house of ill fame where prostitution was carried on. And yet, that is about all that the evidence offered by the Government purported to establish. Louis Remegi, an employee of the Department of Justice, testified that in the course of his investigation of vice conditions in the neighborhood, he called at the Globe Hotel on the evening of September 3, 1918. He met the defendant, the proprietor, there and asked him if he had any girls there. The defendant, according to the testimony of Remegi, replied: "The girl is not working to-night, she is not working to-night, you come here to-morrow at 2 o'clock, she will be here." I said, "All right," and I left the hotel. On September 4, around 2:45 P. M. I entered the Globe Hotel again, and I met Mr. Blanc. I said, "Is the girl in now?" He said, "Yes, are you the fellow that was here yesterday afternoon—I mean last night?" I said, "Yes." He said, "You are the fellow I told to come here at 2 o'clock." I said, "Yes." He said, "The girl is upstairs now." I said, "What room?"

He said, "Room 16, you go up to room 16 and tell her I sent you there." I went up into room 16, and the big fat girl came out and said, "Come right in," and she took me into room 17, where two other fellows were seated waiting for the girl. I sat there a while and she left the room and took one of those fellows into her room and she came back and said, "You will be pretty soon." I said, "How much are you going to charge me for an act of prostitution?" She said, "$1.50." I gave her $1.50. After she received the $1.50 she took this other fellow in. I left the room and got Officers Ohnimus and Dowell, and we came back and put Matilda Campbell under arrest. (Trans. 12, 13.)

On his cross-examination, Remegi testified that he was not in room 16 at all, until Officers Dowell and Ohnimus took him there (Trans. 15); and that he gave her the money in room 17. (Trans. 15). He further testified on cross-examination that Matilda Campbell was the only woman in the house and that when he went there on September 4th. "The only conversation I had with him (the defendant) was I asked him, 'Is the girl in?'" He said, "Yes, she is up in room 16," and he told me to go there.

Q. Nothing was said about any prostitution?

A. No, sir. (Trans. 16.)

Officer Ohnimus testified that he remained in the street while Remegi went into the house on September 4th; that Remegi was gone about ten minutes and that he didn't see any other men around there when he went up. (Trans. 18, 19.)

Mr. Blanc testified that he had been conducting the Globe Hotel for about five years; that it contained about thirty rooms; that at about 10 P. M. on September 3rd Remegi came to his place and asked, "Is the landlady upstairs?" I said, "No." "Where is she?" "She went out." "Where?" "I think she went to Green Street." He said, "Where, what number?" I said, "I don't know." He said, "I will be back to-morrow." He further testified that Remegi came back about 2 o'clock on September 4th and asked: "Has the lady come?" I said, "Yes, right at the top of the stairs, on the second floor." Thereupon Remegi went upstairs. Mr. Blanc further testified that there were no other women in the building; that about 22 of his rooms were rented at the time, all to men, employed at various places about the city; that he had never been in any trouble before and had no knowledge that Matilda Campbell was practicing prostitution. (Trans. 22-25.)

Matilda Campbell testified that she had known Remegi for over a year; that when he came up on September 4th she was cleaning room 17; that she recognized Remegi and took him in room 16 and he gave her $1.50 and she had intercourse with him; that thereupon he went down and came back with the officers and placed her under arrest. (Trans. 30, 31.)

I submit this testimony is wholly insufficient to establish that during the month of September, 1918, the Globe Hotel was a house of ill fame, resorted to for the purpose of prostitution. Remegi, the Government agent, seems to have been the only person

who went there for that purpose. His testimony that a couple of men were waiting in room 17 is contradicted by the testimony of Matlida Campbell and the defendant, and by the statement of Officer Ohnimus, who was waiting down in the street that he saw no other men about the premises. Further, in his direct examination, Remegi testified that when he went up stairs, he went into room 16, and on his cross-examination, he denied that he ever was in room 16 save when he went there with Officer Ohnimus to make the arrest. Doesn't it also seem strange that if he went there and waited in room 17, as he stated, that he should give Matilda Campbell $1.50 before he went into her room with her? Doesn't it seem strange that if, as he stated, two other men were waiting in room 17, no one else saw them and they were not detained or arrested?

The rules of law applicable to this class of cases are quite well settled.

> "The common law offense of keeping a disorderly house is made out by proof that such house was resorted to by immoral persons for the purpose of prostitution."
>
> Comm. vs. Godell, 165 Mass. 588.
>
> "A single act of illicit intercourse in a house is not the keeping of a house of ill fame. It may, with other circumstantial evidence, be sufficient to satisfy a jury that it was kept for the purpose of lewdness and gambling. But it is entirely insufficient in the absence of all other evidence to show the house was 'resorted to' for the purposes forbidden by the statute."
>
> St. vs. Garing, 74 Me. 152.

"The permission of the keeper of a house of a single act of illicit intercourse within it does not of itself constitute the offense described in Gen. St. c 165 Sec. 13 or in c 87 Sec. 6. To hold that it did would be to leave out of view the meaning of the phrase 'resorted to' as used in these sections of the statute. In the language of Chief Justice Bigelow in Com. vs. Stahl, 7 Allen 305, 'The prohibition is against the keeping or maintaining a house, which persons are permitted to frequent for the purpose of unlawful sexual indulgence. The mischief which the statute seeks to prevent is the existence of such places of resort, with the temptations which they hold out and the vices which they engender and encourage.' We do not mean to be understood as holding that, to prove the offense charged, there must necessarily be direct evidence of numerous acts of prostitution or lewdness permitted by the keeper of the house. But the evidence, whether direct or circumstantial, must be sufficient to satisfy the jury that it was kept as a place of resort for such purposes."

Com. vs. Lambert, 94 Mass. 178.

"The statute is designed to prohibit the keeping and maintaining of a house which persons are permitted to frequent for the purpose of unlawful sexual intercourse and to prevent the existence of such places of resort. A single act of lewdness or prostitution would not constitute the offense, which the statute prohibits and punishes."

People vs. Gastro, 75 Mich. 133.

State vs. Clarke, 78 Iowa 492.

> "Such offenses as vagrancy, prostitution and usually the letting of houses for prostitution, depend for their criminal character, not upon a single act, but upon a series of acts, extending over a considerable period of time and are criminal offenses because of their continuance and repetition."
>
> Ferguson vs. Superior Court, 29 Cal. App. 558.

We have directed the attention of the Court to the fact that the so-called case against the defendant rests almost entirely upon the evidence of the police agent, Remegi, who went into the house to entrap the defendant. In this behalf, we respectfully call the attention of the Court to the case of People vs. Pinkerton, 79 Mich. 110, 44 N. W. 180, in which a very similar state of facts existed. In that case the defendant was charged with keeping a house of ill fame, resorted to for the purpose of prostitution and lewdness. She was convicted and sentenced to imprisonment for two years. In reversing the judgment, the Court said:

> "The only two issues which were pertinent were—First: whether she kept a house of ill fame; and second, whether it was resorted to for purposes of prostitution and lewdness. Under the first head, it must be carefully noted that this statute is not aimed merely at unchastity. Such a house, if usually, is not necessarily, kept by persons who are themselves given over to promiscuous intercouse. It is intended to reach only such houses as are sufficiently notorious to have acquired that specific reputation, so that they are offensive as nuisances, in which category they are legally classed in the vicinage,

small or large, where the evil offends; and in addition to evil report, it must be shown to be attended with the actual resort of evil persons for the lewd purposes named in the law. If there is individual misconduct of any less general and public character, it must be reached in some other way. And the utter destruction of reputation that reaches persons guilty of such an offense as is charged is reason why no person should be convicted of it without full legal proof. It is a charge, which, if false, is a cruel one; and while the law has no particular regard for actual criminals, it protects, or should protect, against false charges. It is, or PRESUMABLY IS, SINGULAR THAT ON THIS TRIAL, NO ONE GAVE ANY DEFINITE TESTIMONY OF THE ILL REPUTE OF THE HOUSE, EXCEPT THE POLICE OFFICERS, AND THOSE WHO WERE ACTING WITH THEM, AND THAT THE ONLY EVIDENCE IDENTIFYING RESORT TO THE HOUSE FOR EVIL PURPOSES, BY ANY PERSONS KNOWN OR POINTED OUT, WAS OF A PERSON WHO WAS IN CONCERT WITH THE POLICE, AND WHO WENT FOR THE PURPOSE OF FURNISHING PROOF. IT SHOULD BE HARDLY NECESSARY TO SAY, THAT A HOUSE VISITED OR EVEN RESORTED TO, BY NO MORE THAN ONE PERSON, CANNOT COME WITHIN THE STATUTE. . . .

"The charge which in its general features was properly qualified, failed to meet some of the questions, which were brought to notice. The Court did not call the attention of the jury sufficiently to what is meant by 'ill fame.' We think

it was necessary under the statute to show ill repute in the vicinity. Certainly, no less certainty of ill repute of a house is needed than would show it of a person. Rumors at a distance do not make up reputation. This is more particularly worthy of regard here because the only ill repute shown is given by the police officers, and they are no better witnesses of repute than other persons, even where impartial as they do not seem to have been here. They do not give very definite facts as to ill repute, but if they heard it in the neighborhood, it is singular that no one else was called. . . .

"The Court, in reference to the witness who was or was claimed to have been sent to entrap respondent did not meet the points fully. As already stated, this man was the only person identified by name or otherwise, as having been at the house for evil purposes. The Court did not charge that a single act was not enough, except in connection with the further fact that this man was employed to entrap respondent. The importance of showing that the house was 'resorted to,' WHICH MEANS SOMETHING OF A COMMON OCCURRENCE, was entirely overlooked. We have had doubt whether the case should not have been taken from the jury, but we shall not now pass on that question. It is certainly a very peculiar record which is not credible to the police, and which indicates a harsh and vindictive temper in the methods of prosecution, which had no tendency to bring credit on the persons engaged. It is scandalous to use means to persuade persons into crime; and without what clearly appears to have been such collusion, we do not think the record

shows very much in the way of testimony, if it does anything. Whether this woman is reprobate or not, justice is not respected when it disregards its own safeguards against oppressive prosecution."

And so we may say, eliminating the doubtful testimony of the police agent, Remegi, sent to entrap the defendant and admittedly offering Matilda Campbell money to commit a crime and who, Matilda Campbell swears actually had sexual intercourse with her, there is nothing in the way of legal evidence in the case at bar presented to the Court.

2. Failing to establish that the Globe Hotel was a house of ill fame, the charges contained in Information No. 7248 must also fall for the gravamen of the offense attempted to be set forth in that information is that on September 4, 1918, the defendant directed Louis Remegi to a house of ill fame. The defendant is informed against for a violation of the Order of the Secretary of the Navy, made on August 3, 1918, and contained in United States Bulletin, August 13, 1918, at page 16, reading as follows:

> "To suppress and prevent violation of the aforesaid Act within ten miles of any place under Naval jurisdiction, directing, taking or transporting or offering to take or transport any person for immoral purposes to or assisting by any means any person for such purposes to find, any prostitute or any house of ill fame, brothel or bawdy-house, with knowledge or reasonable cause to know of the character of the person or house is hereby prohibited."

The language used in Information No. 7248 is that the defendant did "unlawfully and knowingly

direct Louis Remegie to room 16, in a certain place, building or structure located at Number 773 Broadway Street, in said city, division and district aforesaid, for the purpose of lewdness, assignation and prostitution. That said place, building or structure is and was at all the times herein mentioned being used for the purpose of lewdness, assignation and prostitution. . . ." (Trans. 3.)

We submit upon the authorities heretofore cited, the evidence fails to establish that the premises described in the information constituted a house of ill fame, brothel or bawdy-house within the meaning of the Order of the Secretary of the Navy. We also respectfully suggest that it requires a considerable effort of the imagination to conceive the defendant directing Remegie, the Government agent, to a house of ill fame, when the evidence clearly shows that Remegie was a Government agent and that he went into the premises for the purpose of entrapping the defendant and that the only conversation he had with the defendant on September 4th was the following: "The only conversation I had with him was I asked him, 'Is the girl in?' He said, 'Yes, she is up in room 16,' and told me to go up there.

"Q. Nothing was said about any prostitution?

A. No sir." (Trans. 16.)

3. We further respectfully submit the trial court was in error in overruling the objection made by defendant to the question asked the witness, Remegie, on rebuttal: Would you have arrested and appeared against this woman, if you had sexual intercourse with her?

The record on the subject is as follows:

"Q. If you had an act of sexual intercourse with a woman, would you bring her up on trial before these gentlemen?

"Mr. HENNESSY.—I object to that as immaterial, irrelevant and incompetent and not rebuttal.

"Mr. COLSTON.—This young man's character has been attacked, and while I don't think the jury will take it any more seriously than I do, I think this testimony is proper.

"Mr. HENNESSY.—I don't think the Court or the jury want a certificate of character from the young man himself and that is what that question implies.

"The COURT.—The objection is overruled.

"Mr. HENNESSY.—Exception.

"Mr. COLSTON.—Q. Would you, if you had an act of sexual intercourse with any woman, would you bring her up here for trial?

"Mr. HENNESSY.—I make the same objection.

"The COURT.—The objection is overruled.

"Mr. HENNESSY.—Exception.

"A. No sir." (Trans. 36.)

The evidence was admissible under no conceivable theory. The woman was not on trial. And even if she were, the evidence was not proper in rebuttal.

4. We respectfully submit neither of the Informations stated a public offense against the defendant for the reason that the Act of May 18, 1917, the Act of October 6, 1917, and the Order of Secretary of the Navy, made on August 3, 1918, are contrary to the provisions of Section VIII of Article I of the Consti

tution of the United States in that they constitute an unlawful attempt by the Federal Government to exercise police powers within the States.

Keller vs. U. S., 213 U. S. 138.
In re Barry, 136 U. S. 597.
McCulloch vs. Maryland, 4 Wheat. 316.
Cooley's Const. Lim. 574.

We further submit Information No. 7248 failed to state a public offense in failing to charge that the defendant directed Louis Remegie to any house of ill fame, brothel or bawdy-house, with knowledge or reasonable cause to know of the character of the house. The allegation of the Information is simply that he directed Remegie to a certain room for the purpose of prostitution and that said building was then being used for the purpose of prostitution. There is no allegation that the defendant knew or had reasonable cause to know the character of the building or that it was being used for the purpose of prostitution.

See Order of Sec. of Navy, Aug. 3, 1918 (supra).

5. We submit the Court erred in denying the motion of defendant in arrest of judgment upon the ground that he had never been committed by any magistrate or indicted by a grand jury upon either of the offenses charged in the Information.

Under the provisions of the Fifth Amendment to the Constitution of the United States, it is provided that: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

militia when in actual service in time of war or public danger."

The Crimes charged against the defendant are "infamous crimes."

> "At common law, the keeping of a bawdy-house was punished with fine and imprisonment and such other infamous punishment as the pillory, etc., as the Court in its discretion should inflict."
>
> 5 Bacon's Abr. 146.
>
> 1 Hawkins P. C. c 74.
>
> Jacob L. Dict.

It has been held that it is no longer the character of the crime but rather the nature of the punishment that may be imposed that determine whether or not a crime is infamous.

> Weeks vs. U. S. 216 Fed. 298.
>
> Ex parte Wilson, 114 U. S. 417.

It has also been decided that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime.

> Ex parte Wilson, 114 U. S. 417.

And that any crime punishable by imprisonment in State's prison, whether with or without hard labor, is an infamous crime.

> Parkinson vs. U. S., 121 U. S. 281.
>
> Makin vs. U. S., 117 U. S. 351.
>
> Bannon vs. U. S., 156 U. S. 466.

And it has been strongly intimated that any crime punishable at hard labor is an infamous crime.

> Wong Wing vs. U. S., 163 U. S. 228.
>
> Byrne's Federal Criminal Procedure, Sec. 114.

Under the provisions of Sec. 13 of the Selective Service Act, a violation of its provisions is made a

misdemeanor and is punishable by a fine of not more than $1000 or imprisonment for not more than twelve months or both.

We submit that any person in danger of being convicted of a crime, infamous at the Common Law, involving moral turpitude and subjecting the guilty person to a punishment so severe as that provided in Section 13 of the Selective Service Law, is entitled to insist that he shall not be put upon his trial except on the accusation of a grand jury as secured by the Fifth Amendment to the Constitution. If the test is, as at the Common Law, the moral turpitude of the offense then I ask what offense can involve more turpitude than the charge of keeping a house of ill fame? If the test is the drastic nature of the punishment, then I ask, is not the penalty of imprisonment for one year and the imposition of a fine of $1000 sufficiently drastic to warrant the granting of all constitutional safeguards to a defendant?

The defendant was never accused by a grand jury and, we submit, his trial without such accusation constituted reversible error.

Respectfully submitted,

FRANK J. HENNESSY,

Attorney for Plaintiff in Error.